France Telecom North America

DOCKET FILE COPY ORIGINAL

July 9, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matter of
Rules and Policies on Foreign Participation
in the U.S Telecommunications Market
IB Docket No. 97-142

Dear Secretary Caton:

Enclosed are an original and four copies of France Telecom's Comments pursuant to the Commission's Notice of Proposed Rulemaking released June 4, 1997, in the above-captioned proceeding. Copies of our Comments were hand-delivered or mailed today in accordance with the attached service list.

Also enclosed is an extra copy which we ask you to please date stamp and return to our messenger.

Sincerely yours,

T Krauss

Theodore Krauss

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Rules and Policies on Foreign Participation in the U.S. Telecommunications Market	)	IB Docket No. 97-142

COMMENTS OF FRANCE TELECOM

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COMMENTS OF FRANCE TELECOM

Pursuant to the Commission's Order and Notice of Proposed Rulemaking ("NPRM")[1] released June 4, 1997 in the current docket, France Telecom ("FT") hereby respectfully submits its comments.

INTRODUCTION AND SUMMARY

FT is encouraged by the prospect of fair competition worldwide and respectfully encourages the Commission to fully implement the U.S. Government's liberalizing commitments made under the historic World Trade Organization Basic Telecom Agreement (WTO Agreement), under which most major trading nations have committed to open their markets, including France. FT acknowledges many of the Commission's proposed changes to its rules and policies on foreign participation in the U.S. telecommunications market, but sees the need for clarification and modification of certain

[1] See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142, Order and Notice of Proposed Rulemaking (released June 4, 1997) ("NPRM").

troubling aspects of the proposals, and to confirmation that the proposals will be applied as outlined in the comments below. The new environment should increase competition and inward investment, encourage new technology and services, and provide substantial benefits to users. Thus, clear and open policies are in the U.S.' interest.

Furthermore, it is crucial that the Commission adopt rules and policies void of ambiguity and beyond reproach, since the Commission's actions will influence how other nations implement their own commitments. The Commission should not adopt rules and policies which may be viewed as an attempt to claw back the WTO Agreement commitments made by the U.S. Otherwise, the U.S.' trading partners may feel compelled to revisit their own policies, and market opening initiatives elsewhere will be jeopardized.

In particular, the Commission should clarify that "public interest" considerations will not be used to reinstate trade or other considerations which are incompatible with the MFN and National Treatment principles under the WTO Agreement. All trade considerations should have been dealt with in the WTO Agreement which is a trade agreement.

In summary, the NPRM, while generally positive in tone, appears to leave room for potential protectionist mischief. The proposed rules should be clarified to remove any suggestion that administrative discretion -- rather than clear rules -- could remain the rule for foreign ownership and licensing decisions. Consequently, in an effort to seek clarity, these comments outline several results which would be expected under WTO Agreement compatible rules and policies. These would include: (i) immediate and automatic removal of the conditions related to FT's investment in Sprint; (ii) immediately and

unconditionally allowing (following notification to the Commission) FT to exchange traffic with any U.S. carrier on any route to or from the U.S. under flexible traffic exchange arrangements which deviate from the Commission's current International Settlements Policy; (iii) immediate, unconditional availability to FT of §214, §310, and submarine cable landing authorizations should FT be inclined to request any such authorization.

If the Commission implements the WTO Agreement commitments in a manner consistent with these comments, it will go a long way towards leveling the playing field between competing telecommunications alliances. As a result, U.S. telecommunications users will benefit.

I. THE COMMISSION SHOULD JOIN THE NATIONS LEADING THE WAY TO A NEW, POST-WTO, WORLDWIDE COMPETITIVE ENVIRONMENT FOR THE BENEFIT OF CONSUMERS

A. Interest of France Telecom: FT Expects Liberalization and Fair Competition Worldwide and Does Not Wish to See Movement Towards an Open Global Market Jeopardized by Ambiguous FCC Policies

FT is encouraged by the prospect of liberalization and fair competition worldwide. As the world's fourth largest telecommunications company[2] and the second largest in Europe, FT is active worldwide and as such has a keen interest in the promotion of open markets worldwide.

[2] FT is the world's fourth largest telecommunications group on the basis of 1996 revenues. FT's consolidated net revenues in 1996 totaled FF 151,259 million.

The combined efforts of the European Union and the United States led to the successful conclusion of the historic World Trade Organization Basic Telecom Agreement (WTO Agreement). As the Commission is aware, FT actively supported the successful conclusion of the WTO Agreement.[3] FT hopes and expects of all WTO Agreement countries that there will be no back-tracking from their commitments, just as France and the French authorities have not hesitated to comply with their commitments to open the French market.

In particular, FT wishes to see a coherent and consistent application of general U.S. policy on foreign carrier entry into the U.S. market. Since FT has embraced the challenges of fair competition in its domestic market and intends to continue its international expansion, FT does not wish to see market opening initiatives abroad discouraged by a restrictive implementation of the U.S. Government's WTO Agreement obligations.

The Commission's initiative to implement the WTO Agreement commitments of the United States will set a very important precedent for other nations. Much of the world will look to leadership from the Commission. Because of this leadership role, it is critical that the Commission's rules and policies on implementation of the WTO Agreement set a good precedent. FT is concerned that other nations may follow suit if the U.S. is perceived as protecting its market, or of adopting rules which are malleable and which arguably could be misused in the future to create barriers to trade. In that situation, other

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[3] See February 7, 1997, Comments of FT in International Settlements Rates, IB Docket No. 96-261 (Benchmarks Proceeding), pp. 4-5. FT also unambiguously expressed its support for a WTO Agreement to the French government and European authorities.

nations may rely on the Commission's policies to justify their own protectionist inclinations. Or, trading partners may simply feel compelled to revisit their own policies in order to maintain or adopt new, less open, rules in an effort to retain an even bargaining position with the U.S. for bilateral market opening discussions.

B. Public Interest Considerations Should Not be Used as Barriers to Trade

FT has certain concerns with respect to the Commission's proposals to apply public interest factors to the grant of Section 214 authorizations or submarine cable landing licenses, or to permitting foreign carriers, from WTO Agreement countries, to own up to 100% of common carrier radio station licenses, as permitted by Section 310(b)(4).[4] Although maintaining the flexibility to reflect reasonable national security and law enforcement concerns is understandable, the Commission should adopt a "national treatment" principle in applying the public interest test. The public interest should not take into account the fact that the licensee would be controlled by a foreign entity, or the characteristics of the home market of the entity under the guise of continuing to "consider" "trade concerns" raised by the Executive Branch. To consider such trade-related matters would be to restore the ECO test, albeit in another form, which would then undercut the U.S. WTO Agreement commitment and would be inconsistent with MFN non-discrimination principles.

Furthermore, trade considerations should no longer be relevant once the WTO Agreement takes effect. The WTO accord is a trade agreement. Consequently, trade

[4] See NPRM at ¶74; ¶43 (for §214 authorizations); ¶62 (for submarine cable landing licenses).

considerations should have been addressed comprehensively and conclusively with the WTO Agreement. For the Commission to suggest otherwise in articulating the public interest factors it will continue to consider will leave the U.S. Government open to attack that it has established a policy which permits it to claw back some of the commitments made in the WTO Agreement.

The Commission's public interest test should be clear, predictable and fully consistent with the U.S. commitment in the WTO Agreement and the principles of GATS. If the Commission adopts an opaque test, other countries will do likewise and may apply such tests in a manner which is adverse to the desired rapid development of a healthy competitive environment. Thus, FT urges the Commission to refrain from denying an authorization or license based on "serious concerns" of the Executive Branch that are tied to the nationality or "foreignness" of the applicant or market entrant.

More generally, FT respectfully suggests that the proposed rules be clarified to remove any suggestion that administrative discretion - - rather than clear commitments - - could remain the rule in foreign ownership and licensing decisions. Ideally, the Commission should simply and clearly state that any §310(b)(4) or §214 or submarine cable landing license application concerning a carrier from a WTO Agreement country serves the public interest, absent special national defense or security problems, or other clearly identified, objective, non-trade or nationality specific, considerations. All applicants must be treated equally (National Treatment), and reasons for denial or conditions must attach equally to all applicants (MFN and National Treatment).

C. The Commission's Proposals Must be Viewed in Light of the Strong Market Opening Commitments and Achievements by Europe and Other Major Trading Nations

The Commission's initiative in its NPRM is timely because it complements the market opening commitments by other major trading nations.

1. France and Europe Have Made Strong Market Opening Commitments Which Have Already Largely Materialized

Like the U.S., France passed sweeping telecommunications legislation in 1996 pursuant to which France will be at least as open to competition as the U.S. market effective no later than January 1, 1998.[5]

In addition, the European Union (EU), France and most other major trading nations have made a strong commitment to market access and competition in the WTO Agreement, which will be fully realized with the opening of most of the EU market, including France, to voice telephony competition as of January 1, 1998. Like the U.S., the EU offer regarding France allows for 100% indirect ownership of the shares or voting

[5] See July 31, 1996, Progress Report on Liberalization Developments in France and Germany ("Progress Report") and related September 23, 1996 FT Reply Comments filed in the context of the ongoing Sprint Corporation proceeding, Sprint Corporation, 11 FCC Rcd 1850 (1996) ("Sprint Order"). Since the Progress Report and FT's September 1996 Reply Comments, many additional strides have been made in France to fully open the market. A new regulatory authority has been created, and France has adopted several decrees to implement the 1996 legislation, just as the FCC has been implementing rules for the US Telecommunications Act of 1996. Also, several licenses have been granted to new entrants, including U.S. operators, and interconnection agreements have already been reached with companies such as WorldCom. France Telecom is also facing increasing competition in many already liberalized services from new entrants.

rights of companies authorized to establish radio-based infrastructure for the provision of telecommunications services to the general public.[6]

The EU and France are also committed to the principles in the Reference Paper on Pro-Competitive Regulatory Principles ("Reference Paper") negotiated as part of the WTO Agreement. Such commitment has already become a reality in France where sweeping reform legislation was adopted last year and a new independent regulatory body, the ART (Autorité de Régulation des Télécommunications), was established as of January 1, 1997.[7] In short, through its ongoing activities and in committing to the WTO Agreement, France is fulfilling the representations it made to the Commission in the context of the Sprint proceeding.[8] Of course, such commitment has remained intact notwithstanding the recent change of government in France.[9]

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[6] European Communities and their Member States, Schedule of Specific Commitments, Supplement 3, submitted to the World Trade Organization, Group on Trade in Services, April 11, 1997.

[7] The five ART commissioners are irrevocable and cannot be re-appointed. Art. L. 36-1, July 26, 1996 Law No. 96-659 on the Regulation of Telecommunications.

[8] Sprint Order at ¶64, ¶69.

[9] Most recently, when asked in an interview about France's commitment to opening its market fully to competition on January 1, 1998, the chairman of the independent regulator ART, Jean-Michel Hubert, explained that the ART will "implement the [liberalization] program normally". With respect to the pending delay of FT's IPO, Mr. Hubert went on to explain that "[w]hatever the status of France Telecom may be, this doesn't change the fact that this company must compete in a totally open market. The law has been adopted last year, and 1997 is devoted to its implementation. The principle of competition should be confirmed, it should bring benefits to the economy as a whole and, simultaneously, the public service." See "French regulator confirms commitment to opening markets", *Satellite Week,* June 23, 1997 (interview allaying post-election doubts about competition in France).

2. The Strong Commitments by Most Major Trading Nations Address the Commission's Stated Objectives

The WTO Agreement commitments should result in achievement of the Commission's goals, as set forth in its NPRM. The Commission states that it seeks to promote effective competition particularly in the international telecommunications market, to prevent anti-competitive conduct in the provision of international services or facilities, and to encourage foreign governments to open their communications markets.[10]

The WTO Agreement essentially addresses each of these concerns. Having been concluded under the framework established by the General Agreement on Trade in Services (GATS), the WTO Agreement incorporates such GATS non-discrimination rules as Most Favored Nation Treatment (MFN), National Treatment, and Market Access.[11] The MFN rule requires WTO members to treat all other WTO members similarly, while National treatment requires a WTO member to treat companies from other WTO members as it treats its own companies. Finally, Market Access generally requires a WTO member to grant access to its market to other WTO members on the terms specified in its schedule of commitments.[12]

The Reference Paper also goes a long way towards answering the Commission's objectives. Of the sixty-nine (69) signatories to the WTO Agreement, 65 countries incorporated the Reference Paper into their offer and thus committed to enforcing fair rules of competition which will cover interconnection, competition safeguards and

[10] See NPRM at ¶16, ¶¶25-27.

[11] Id. at ¶22.

[12] Id.

transparent and independent regulation of telecommunications services.[13] In addition, even WTO members that have not made specific commitments of Market Access are still subject to the general obligations of GATS.[14]

Strong WTO Agreement commitments have been made by most major trading nations. The sixty-nine (69) signatories to the WTO Agreement (which represent 95 percent of global telecom revenues) have agreed to competition in basic telecommunications services. Of the sixty-five (65) countries which incorporated the Reference Paper into their offer, fifty-two (52) have granted market access for international services. These 52 countries account for approximately 90 percent of telecommunications revenues in WTO Agreement countries.[15] In its current NPRM, the Commission has recognized that the fair rules of competition to be enforced by signatories to the WTO Agreement will fundamentally alter the competitive landscape for telecommunications worldwide[16] and that "[w]ith the WTO [] Agreement, competition will become more the rule than the exception on the foreign end of major U.S.

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[13] Id. at ¶2, ¶9, ¶28.

[14] Id. at ¶36. However, such undertaking may be somewhat meaningless, since the disciplines are only relevant where market access allows one into the market.

[15] Id. at ¶28; see also ¶62 (none of 68 other countries retained right to deny cable licenses on basis of reciprocity); ¶73 (27 countries, including world's major markets, agreed to open their markets to 100% foreign investment in wireless services as of 1/1/98, and others to permit lesser degrees of investment and/or at later dates).

[16] See NPRM at ¶2.

international routes."[17] The Commission regards these rules as embodying the same principles as the Telecommunications Act of 1996.[18]

Finally, the WTO Agreement obligations are enforceable by a carrier's representative government in the context of the WTO dispute settlement procedures.[19] If a U.S. carrier were ever denied access to a WTO market, the U.S. Government could bring a trade dispute against the foreign government to the WTO. While specific performance is not envisioned, the remedies available include trade retaliation against the offending country in any goods or services sector. In summary, for the WTO Agreement countries, competition should be allowed to play its course with a strict minimum of regulatory intervention. As a matter of policy, the new post-WTO Agreement environment should be given a chance to operate and yield benefits to consumers before excessive rules and policies are developed to protect the U.S. market from perceived threats which have yet to materialize. Such an approach would be consistent with the Commission's policies in other matters, such as, its recent Access Charge Reform Order,[20] where it asserted that a market-based approach "is most consistent with the pro-competitive, deregulatory policy contemplated by the 1996 Act. Accordingly, where

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[17] Id. at ¶115.

[18] Id.

[19] Id. at ¶¶23- 24.

[20] See Access Charge Reform, CC Docket Nos. 96-262 et al., FCC 97-158, First Report and Order, (rel. May 16, 1997) ("Access Charge Reform Order").

competition is developing, it should be relied upon in the first instance to protect consumers and the public interest."[21]

II. WTO COMPATIBLE FCC POLICIES SHOULD HAVE SEVERAL EFFECTS, INCLUDING: AUTOMATIC REMOVAL OF SPRINT ORDER CONDITIONS; IMMEDIATELY ALLOWING FLEXIBLE TRAFFIC EXCHANGE ARRANGEMENTS; IMMEDIATE AVAILABILITY OF §214, §310 AND SUBMARINE CABLE LANDING AUTHORIZATIONS; AND LEVELING THE PLAYING FIELD

The Commission's proposals do not consist of a simple, clear cut statement that the U.S. market will be open on a non-discriminatory, WTO-compatible basis and without any further trade considerations. Instead, the NPRM is an intricate document which, while generally positive in tone, appears, as noted above, to leave room for potential protectionist mischief. Thus, this Part II of these comments seeks to clarify and to lay to rest potential questions about the Commission's intentions through a discussion of how the Commission's new rules and policies are expected to be applied in the case of an example such as that of a carrier in FT's situation. To the extent FT is erroneous regarding its interpretations of the Commission's proposed rules and policies, the Commission is respectfully requested to so indicate expressly.

Specifically, from the perspective of FT, assuming the Commission's market opening proposals are adopted and applied in a WTO compatible manner, the effects of such new rules and policies should include the following:

- immediate and automatic removal of the conditions related to FT's investment in Sprint (II.A);

[21] NPRM at ¶ 44.

- immediately and unconditionally allowing (following notification to the Commission) FT to exchange traffic with any U.S. carrier on any route to or from the U.S. under flexible traffic exchange arrangements which deviate from the Commission's current International Settlements Policy (II.B and C);
- immediate, unconditional availability to FT of §214, common carrier radio station (pursuant to §310), and submarine cable landing authorizations should FT be inclined to request any such authorization (II.D);
- leveling the playing field between competing alliances (II.E).

A. Continuing to Apply the ECO Test to Foreign Carriers from WTO Countries is Incompatible with the U.S. WTO Commitment, Including with Respect to the Sprint Order

The thrust of the Commission's NPRM is that its ECO test is not compatible with the WTO Agreement commitments of the United States. FT agrees with this conclusion. In addition, administration of the ECO test has proven to be unnecessarily burdensome and to involve the Commission in minute scrutiny of the home market of a foreign carrier entering the U.S. market.[22] In this regard, FT can speak from its own experience in the Sprint proceeding pursuant to which FT's and Deutsche Telekom's (DT) respective 10% investments in Sprint were approved subject to certain conditions designed to encourage liberalization of the French and German telecommunications markets[23]. By eliminating

[22] Id. at ¶ 34.

[23] While the Sprint Order sought to ensure that French governmental commitments to open the market were met, the Sprint Order offers no indication that the Commission's original intention was to take on the task of second guessing and micro-managing the regulatory process in France. See September 23, 1996 FT Reply Comments related to

the ECO test, the Commission and private parties can save valuable time and resources which, at least from the carriers' perspective, can be more appropriately directed toward serving customers.

The Commission proposes to eliminate the ECO test from pending and future Section 214 proceedings[24] and states that the rules that it proposes to adopt will apply to a proceeding in any procedural status[25] . The Commission also proposes to adopt a similar rule (i.e., not applying the ECO test) with respect to the notification procedure of 47 C.F.R. §63.11 and whether an investment by a foreign carrier raises a substantial question as to the public interest[26] .

The Sprint Order applied an ECO analysis under Sections 214 and 310(b)(4) with respect to the French and German markets. Although the Commission concluded that the FT investment in Sprint was in the public interest, the Commission determined that France and Germany did not meet the ECO test and consequently imposed several conditions on the transaction.

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the Sprint Order proceeding. Nonetheless, FT's competitors have, with dogged persistence, sought to inject doubt at the Commission regarding the liberalization process in France and consequently attempted to bog down the Commission, FT, DT and Sprint with the unproductive task of sorting through the details of the French market reforms. This effort to confuse and tie up the Commission in matters which cannot be adequately addressed by the Commission's excellent but limited staff and resources was apparently motivated by the competitors' fears that the Commission might give credit where credit is due and acknowledge the dramatic developments which have occurred in France.

[24] NPRM at ¶32.

[25] Id. at 44.

[26] Id. at 143.

FT assumes that the Commission's policy conclusions in the instant proceeding would automatically apply to the Sprint proceeding, which is still an "open" or "pending" proceeding at the Commission. The ECO test itself still is germane to the Sprint proceeding because, in concluding that France and Germany did not meet the ECO standard, the Commission ordered Sprint to file reports that would demonstrate the progress being made toward competition and liberalization in those countries.[27] In particular, a final report is to be filed in March 1998 that must demonstrate that France and Germany have, at that time, met the ECO test.[28]

In addition to the ECO showing, the open Sprint proceeding imposes other conditions on Sprint and its partners which are related to the Commission's determination that the French and German markets did not pass the ECO test back in 1995. These conditions include: a circuit freeze; a condition relating to FT's accounting rate; a restriction on special concessions (which is the same as the Commission's general "no special concessions" rule); and tariff filing requirements and other reporting and record maintenance requirements. The circuit freeze, accounting rate and liberalization status reporting obligation conditions are incompatible with the WTO Agreement because they conflict with the U.S.' market opening commitment (the U.S. made no reservations with respect to such matters), and, more generally, because they single out FT and DT for discriminatory treatment. Likewise, to retain an across the board "no special concessions" condition in the Sprint Order while loosening for other carriers the

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[27] Sprint Order at ¶152.

[28] In the meantime, Sprint is expected to update the record of the open Sprint proceeding with a July 31, 1997 progress report on the situation in France and Germany.

Commission's general prohibition against special concessions would also be incompatible with the WTO Agreement. The same applies to the tariff filing and other reporting and record maintenance requirements to the extent they single out the FT and DT investment in a discriminatory manner (presumably these requirements will be automatically eliminated with the WTO Agreement and replaced, if maintained at all, with the Commission's standard basic safeguards).

In summary, to essentially retain the ECO test for investors from France and Germany would be discriminatory, and would violate the MFN non-discrimination rule. Furthermore, it would be unfair to France and Germany, singled out from among all WTO Agreement countries, to be subject to showings that are required by reference to the ECO test. The fact that FT and DT invested in the U.S. market prior to the WTO Agreement should not place Sprint and FT/DT at a competitive disadvantage compared to cases where foreign carriers enter after adoption of the Commission's proposed rule (or entered before the Foreign Carrier Entry Order) .

Whether or not the Commission had intended its proposed new policy to apply to the open or pending Sprint proceeding, the ECO test is incompatible with the WTO Agreement and thus the ECO test related conditions of the Sprint proceeding cannot survive the WTO Agreement commitment. Thus, although as a matter of law such conditions will automatically cease to have any effect once the WTO Agreement becomes effective, FT respectfully requests the Commission make explicit in the instant proceeding the removal of the Sprint Order conditions. Such an explicit statement would

confirm the Commission's good faith intention not to undermine the U.S. Government's WTO Agreement commitments.

From the standpoint of ensuring a competitive environment, the Commission has nothing to lose from declaring that the ECO showing and all other conditions will automatically terminate once the Commission's proposals are adopted. France and Germany, through the EU, have made very strong WTO Agreement commitments. The WTO Agreement commitments that they have made are, in a real sense, a substitute for the ECO-related reports that the Commission has required in the Sprint proceeding because they are binding legal commitments to market liberalization, not to mention already existing EU legislation and the sweeping telecommunications reform law adopted in France last year which irrevocably committed France to complete its already largely accomplished market opening initiatives by January 1, 1998[29]. Indeed, it is just such commitments from WTO Agreement countries that provide the rationale for the Commission's NPRM.

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[29] Likewise, the other Sprint Order conditions are basically no longer relevant. As for the accounting rate condition, as a result of strategic decisions unrelated to the Sprint Order, FT's own settlement rate for US-France traffic has dropped dramatically in the last several years from about 85.5 cents (0.6 SDR) per minute in 1990 to 13.7 cents (0.095 SDR) per minute effective January 1, 1997.

With respect to the conditions to lift the circuit freeze, alternative infrastructure has been competitive in France for nearly a year and the resale opportunities contemplated by the Commission will be available in France in the near term. Finally, given the opening of the French market and FT's limited investment in Sprint, the special concessions prohibition is at odds with the philosophy behind the Flexibility Order. Cf. Regulation of International Accounting Rates, CC Docket No. 90-337 (Phase II), Fourth Report and Order (released December 3, 1996) ("Flexibility Order") at ¶ 51 (creating an exception to the no special concessions rule).

Nor does the FT/DT investment in Sprint present anything resembling a "very high risk to competition," as defined by the Commission in ¶¶ 39-40. FT/DT have not engaged in any conduct that would warrant "denial of an authorization" under a Section 214 or would justify a determination that their investment presents a substantial threat to competition[30] . Also, a 10% interest in Sprint is not a substantial incentive to provide unreasonably favorable treatment to Sprint. Finally, in the course of the Sprint proceeding, the Executive Branch did not raise other public interest factors that would justify retaining the ECO-based conditions of the Sprint Order[31].

B. For Operators from WTO Markets - Accounting Rate Flexibility Should be the Rule

The Commission's Flexibility Order should of course be applied in a non-discriminatory, WTO-compatible manner. In this regard, FT expects that under the Commission's new policies FT will be able to immediately and unconditionally exchange traffic with any U.S. carrier on any route to or from the U.S. under flexible traffic exchange arrangements which deviate from the Commission's current International Settlements Policy, subject only to FCC notification and without an ECO showing.

Under the FCC's revised rules and policies, flexibility should be the rule for all operators from WTO Agreement countries.[32] Thus, no ECO analysis should be conducted for purposes of determining whether to permit flexibility with a carrier from a

[30] NPRM at ¶41.

[31] See id. at ¶43.

[32] Id. at ¶149.

WTO Agreement country. To do so would be to raise, once again, the problems of burdensome examination of a country's regulatory scheme[33].

Given the WTO Agreement commitments to market opening, it is appropriate to place any burden of proof on those opposing a petition for flexibility with respect to a carrier from a WTO Agreement country[34]. In response to the Commission's request in ¶ 153 on the showing required to rebut the presumption of flexibility, the petitioner objecting to a flexibility arrangement should have to show (i) that there is no de jure openness in the petitioner's market, and (ii) that no competing carriers have been licensed. Such a test would be fair, simple and easy to administer. Market power of the foreign correspondent should not be an issue, provided the market has been legally opened, and at least one competitor to the foreign correspondent has been licensed. The Commission should not, however, become bogged down in any analysis of de facto competition, such as the extent to which competing carriers in the foreign market have been successful in launching operations, developing market share, etc. It should be sufficient that a legal framework for de jure market openness has been put in place; a simple second prong to such de jure openness would be whether a competing carrier has been licensed.

Finally, with respect to how the Commission should go about determining whether a WTO market is de jure open, the Commission should abstain from burdening itself with reviewing whether fair rules of competition are in place (as the Commission

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[33] Id. at ¶34.

[34] Id. at ¶152.

proposes, at ¶ 152)[35]. A more objective, less intrusive and less burdensome approach would be to allow rebuttal of the presumption only where the Reference Paper (or equivalent provisions) has not been committed to with respect to the foreign destination(s) in question.

C. Clarification is Sought on the Interrelationship between the Commission's Proposals regarding the Flexibility Order and its Proposal to Relax its "no special concessions" Requirement

In connection with the foregoing, FT seeks clarification of the interrelationship between the Commission's proposal regarding the Flexibility Order and the proposal to relax its "no special concessions" requirement. Specifically, FT seeks confirmation that under the Commission's new policies, any carrier from a de jure open market, regardless of its market power, will be able to exchange traffic on all routes and with any U.S. carrier pursuant to the Flexibility Order as discussed above.

This issue has come up because the Commission's proposal to ease the application of the "no special concessions" requirement only for carriers with no market power[36] appears to be in direct conflict with the presumption of flexibility for all carriers from WTO Agreement countries. The Commission stated in its Flexibility Order that the approval of alternative arrangements effectively creates an "exception" to the "no special concessions" prohibition .[37] On the other hand, the Commission's proposals in the instant

[35] This is a matter of principle and a suggestion to remove administrative burdens under the Commission's revised rules and policies. FT has no doubt that the regime in France would easily survive any such scrutiny by the Commission.

[36] NPRM at ¶115.

[37] Flexibility Order at ¶ 51 (creating an exception to the no special concessions rule).

proceeding contemplate full benefit under the Flexibility Order for all carriers from WTO Agreement countries, including carriers with market power, since the WTO Agreement will substantially lessen the ability of foreign carriers with market power to discriminate among U.S. carriers.[38]

Market power should not be an issue of concern to the Commission for carriers whose home markets are bound open as a matter of law to competition (i.e. as long as there is a commitment to the Reference Paper principles). Any other approach would result in unfairly disadvantaging carriers (vis-à-vis their non-dominant competitors) that are "dominant" but do face a legally open market. Furthermore, in the Flexibility Order, the Commission specifically declined to preclude dominant carriers - or carriers with market power - from establishing alternative arrangements under the Flexibility Order.[39]

D. Carriers from WTO Agreement Countries Such as France Should Benefit from Immediate, Unambiguous Availability of §214, §310(b), §310(d) and Submarine Cable Landing Authorizations under the Commission's New Rules and Policies.

1. Section 214 Authority

The Commission has proposed to eliminate the ECO test (and equivalency test) as a measure of its public interest analysis for pending and future Section 214 applications filed by foreign carriers from WTO Agreement countries for the following services[40]:

(i) facilities-based international switched services;

(ii) resale of international switched services;

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[38] See NPRM at ¶ 148.

[39] Flexibility Order at ¶ 45.

[40] NPRM at ¶¶29-52.